IN THE

Supreme Court of the United States

October Term, 1977

No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51st STREET REALTY CORPORATION, UGP PROPERTIES, INC.,

Appellants,

v.

THE CITY OF NEW YORK, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF THE REAL ESTATE BOARD OF NEW YORK, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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January, 1978

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The Real Estate Board of New York, Inc. (the "Board") hereby respectfully moves, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief *amicus curiae* in support of the Appellants in the above-captioned case.[1]

The Board is a New York City association of those involved in the real estate industry, property owners, de-

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[1] As provided for in Rule 42(2) of the Rules of this Court the Board attempted, but was unable to obtain, consents from all the parties to this case. Counsel for Appellees consented to the appearance of The Real Estate Board of New York, Inc., as *Amicus Curiae*, however counsel for appellants did not.

velopers, lenders, managers and brokers. Its current membership is 3,344. Most of its owner members own property in New York City and the surrounding area, but many have interests and holdings throughout the United States.

The Board has a philosophical commitment to the traditional respect our society affords private property and private property rights. It believes that any change in these constitutionally guaranteed areas must come, if at all, gradually so that the stability of property ownership and property values is not unduly impaired. On a more practical level the members of the Board are continuously concerned with the preservation and development of real property. The Board is profoundly concerned that the rules of law and governmental processes affecting the ownership and development of real property are reasonable, clear, of relatively easy application and capable of operating at high levels of predictability. Therefore, the Board has a great interest in decisions that will have a general impact on real property law, the regulation of land use and development and the valuation of real estate for sale, leasing, mortgage financing, review of real estate tax assessments and the exercise of eminent domain.

The decision now on appeal before this Court was decided by the Court of Appeals of New York. It will have immediate ramifications on the law of New York State in these areas and will therefore immediately affect the owner members of the Board and the real estate industry in general. Because that decision rested on the interpretation of rights embodied in the Federal Constitution, it will also potentially affect the law of other states as well.

The Court below held that the Fifth and Fourteenth Amendments are not violated where a municipality regu-

lates individual historic landmarks, without providing compensation, in a manner which prevents an owner of the landmark from realizing a reasonable return. It further held that in ascertaining the base upon which reasonable return is computed, a component which the Court variously refers to as "accumulated indirect social and direct governmental investment"; or the "contributing external factors derived from the social complex"; or "society's contribution";—must first be subtracted. A reasonable return, in its view, is only constitutionally required on the residue or base, which the Court variously refers to as the "privately created and privately managed ingredient"; or the "privately contributed ingredient" of the property's value. The Court below also held that in ascertaining reasonable return on this reduced base it is proper to impute to the landmark property income that an owner may derive from other properties it may happen to own in the vicinity of the landmark. These results were reached under an operative statute that defined reasonable return as an annual net return of 6% on the assessed valuation of the landmark, treated as a single property entity.

The Board respectfully submits that these conclusions of the Court below are in conflict with prior decisions of this Court dealing with the relationship of the police power to the Fifth and Fourteenth Amendments. Additionally, the Board submits that the holdings below on the issues of reduction of base and the imputation of income between separate properties of a single owner, constitute wholly unprecedented departures from traditional concepts of Anglo-American property law, and from the statutory guidelines established in the operative regulation, a landmarks preservation ordinance.

It is the opinion of the Board that if the legal analysis and conclusions of the Court below on these questions are

allowed to stand, traditionally accepted principles of private property will be seriously undermined. The Board also believes that the decision below introduces into questions of property valuation and assessment large areas of uncertainty and unpredictability. These unsettling effects of the decision of the Court below will be felt in condemnation, tax and real property assessment cases, and in all other related areas of the law where the valuation of real property is in issue.

Nor can it be clear from the decision below that the holding of the Court of Appeals was limited to designated landmarks belonging to railroads or public utilities, which have traditionally been assisted by the public through franchises, grants and other benefits. The Court below formulated the first of the two basic issues before it in general terms as the extent to which government must, "when regulating private property", allow a reasonable return on public contributions not created "by the efforts of the property owner." There is no inherent limitation on the application of the principle to such landmark property alone.

Furthermore, the reasoning of the Court below cannot logically be confined to such landmark property. It observed that "no property has economic value in the absence of the society around it. . . ."; and that reasonable return need not be guaranteed on "opportunities for the utilization or exploitation [of attributes derived from the 'social complex'] which an organized society offers to any private enterprise. . . ." In its recapitulation of its holding the Court of Appeals stated, in general language, that "a property owner is not absolutely entitled to receive a return on so much of the property's value as was created by social investment." Again, there is no qualification which would necessarily limit the import of this holding to only landmark property belonging to a railroad or to a public utility.

The Board contends that the implications of the decision below greatly transcend the interests of the parties litigant. It therefore seeks leave, from this Court, to file its *amicus* brief to demonstrate that these implications are inconsistent with constitutional principles, unsettling to our concepts of private property, destructive of property values and erroneous as a matter of law. Leave is therefore sought to address the following question and its three subdivisions:

Are a private property owner's rights under the Fifth and Fourteenth Amendments violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance):

(a) An owner is denied its right to a reasonable return on its property?

(b) The return on its regulated-business property is computed on a base from which social contributions are excluded, and to which income from other property it owns is imputed?

(c) Speculative air development rights are deemed to constitute significant and perhaps fair compensation for definite legal rights it possesses under valid contracts?

Respectfully submitted,

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Preliminary Statement

The Real Estate Board of New York (the "Board") submits this brief as *amicus curiae,* addressed to certain issues specified below. The Board urges this Court to consider, in reviewing the order of the Court of Appeals of New York, the arguments raised *infra* as to the reasoning upon which the decision of the Court of Appeals is based. The order of the Court of Appeals, entered on June 23, 1977, unanimously affirmed an order of the New York Appellate Division for the First Judicial Department. The order of the Appellate Division, with two of the five justices dissenting, reversed an order of the Supreme Court of New York, New York County in favor of Appellants.

Opinions Below

The opinion of the Court of Appeals of New York (the "Court of Appeals"), is reported at 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977). The majority opinion of the Appellate Division of the Supreme Court of the State of New York (the "Appellate Division") is reported at 50 App. Div.2d 265, 377 N.Y.S.2d 20 (1st Dep't 1975); and the minority opinion at 50 App. Div.2d at 275, 377 N.Y.S.2d at 30. The opinion of the Supreme Court of the State of New York, New York County, per Saypol, *J.*, is unreported but is annexed to the Jurisdictional Statement as Appendix C.

Questions Presented

The Board as *amicus curiae,* addresses this brief solely to the following questions:

1. Are a private property owner's rights under the Fifth and Fourteenth Amendments violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance), an owner is denied its right to a reasonable return on its property?

2. Are a private property owner's rights under the Fifth and Fourteenth Amendments violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance), the return on its regulated-business property is computed on a base from which social contributions are excluded and to which income from other property it owns is imputed?

3. Are a private property owner's rights under the Fifth and Fourteenth Amendments violated

where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance), speculative air dvelopment rights are deemed to constitute significant and perhaps fair compensation for definite legal rights it possesses under valid contracts?

The Board has not formulated and does not express a position with respect to any of the other issues presented by the Appellants.

Interest of the Board as *Amicus Curiae*

The Board is a New York City association of those involved in the real estate industry, property owners, developers, lenders, managers and brokers. Its current membership is 3,344. Most of its owner members own property in New York City and the surrounding area but many have interests and holdings throughout the United States.

The Board has a philosophical commitment to the traditional respect our society affords to private property and private property rights. On a more practical level those Board members, who are concerned on a daily basis with questions involving the ownership and operation of real property in New York City, have a strong interest in seeing that the laws affecting real property and their administration are reasonable, clear, of relatively easy application and capable of operating at high levels of predictability. Therefore, the Board has a great interest in decisions that will have a general impact on real property law, the regulation of land use and development, the valuation of real estate for sale, leasing, mortgage financing, review of real estate tax assessments, the exercise of eminent domain, aesthetics and landmarks preservation.

It is the opinion of the Board that if the legal analyses and conclusions of the Court of Appeals of the State of New York are allowed to stand, it will subject real property to governmental action which may deprive property of its value without compensation and introduce thereby large areas of uncertainty and unpredictability into the ownership and operation of property. These unsettling effects of the decision of the Court below will be felt in landmarks preservation, condemnation, tax and real property assessment cases, and in all other related areas of the law where the valuation or control of the use of real property is in issue. The Board contends that the implications of the decision below greatly transcend the interests of the parties litigant.

Statement

In 1967 Grand Central Terminal ("Grand Central" or the "Terminal"), a privately owned commercial railroad terminal located in Manhattan, New York, was designated a landmark and a landmark site. These designations were made under the Landmarks Preservation Ordinance (the "Ordinance"), Administrative Code of the City of New York, §§ 207-1.0 *et seq.* (the "Admin. Code"), by the Landmarks Preservation Commission of the City of New York (the "Commission" or the "City"). The Ordinance, adopted pursuant to State enabling legislation,[1] seeks to limit, through the exercise of the City's police power, the destruction or alteration of landmarks. The effect of these designations was to prevent any construction on the site or alteration of the exterior of the Terminal without the

[1] N.Y. General Municipal Law, § 96-a (McKinney).

prior consent of the Commission. Admin. Code, §§ 207-4. 0-6.0.[2]

Between July, 1968 and January, 1969 Penn Central Transportation Company (together with its subsidiaries, the New York and Harlem Railroad Company and the 51st Street Realty Corporation) and UGP Properties, Inc., respectively the owner and the prospective developer, pursuant to contract, of air rights above Grand Central (hereinafter referred to collectively as "Penn Central") submitted to the Commission several applications for permission to construct an office building in the air space above the Terminal which was authorized under the existing zoning ordinance.

The first development plan submitted to the Commission became known as Breuer I, named for the renowned modern architect Marcel Breuer, whose firm prepared the design. Under Breuer I, a modern, high-rise office building was to be constructed over the Terminal in such a fashion that no alteration of protected exterior features of the Terminal, especially its south facade with its striking example of the French Beaux Arts architectural tradition, would occur. (214-17, 228-29, 23[3] Only after the Commission rejected Breuer I did Penn Central submit an alternative plan, known as Breuer II Revised. The design envisioned by Breuer II Revised was substantialy similar to

[2] The Ordinance defines "landmarks" as certain improvements, including buildings at least thirty years old which, in the opinion of the Commission, possess "a special character . . . historical or aesthetic interest or value. . . ." Admin. Code, § 207-1.0(n). A "landmark site" is defined as a unit of real property containing a landmark "and any abutting [real property] used as and constituting part of the premises on which the landmark is situated." Admin. Code, § 207-1.0(o).

[3] The numbers refer to pages in the Record on Appeal in the Court of Appeals.

Breuer I. Unlike Breuer I, however, Breuer II Revised required the demolition of the south facade and of a part of the Terminal itself which now consists of a waiting room and commercial space fronting on 42nd Street in Manhattan. Under both Breuer I or Breuer II Revised the Terminal's main concourse, a large, airy room 125 feet high at its apex and, according to the Commission, its most striking feature, was to to be preserved. (50 App. Div.2d at 269; 377 N.Y.S.2d at 24; 2817).

In August, 1969, following a hearing, the Commission rejected both the resubmission of Breuer I and also the initial submission of Breuer II Revised. (2242-2255) In its written opinion rejecting the apppropriateness of Breuer I, the Commission distinguished the effect on the Terminal of the Pan American Building, a high-rise office structure, that already exists on the designated site. It wrote that while the Pan American Building, which is located due north of the proposed new building "is about 375 feet back of the south face of the Terminal. . . . [t]he south face of Breuer I would be only 30 feet away." Therefore:

> "[A]ll the softening effects of distance (atmospheric perspective) and all the present sense of separation would be lost. The full play of sunlight and shadow on the Breuer facade would be in direct competition with the richly modelled design of the Terminal below it and nearly in the same plane."

The Commission concluded that:

> "[T]o balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the landmark itself to the status of a curiosity." (2250-51)

The Commission also ruled, when it rejected the two Breuer plans, that it did not have jurisdiction to consider Penn Central's application for relief from the Ordinance on the ground of economic hardship. (2246-47) Although § 207-8.0 of the Ordinance generally allows the Commission to grant such relief where a designated commercial landmark is not realizing a reasonable return, commuter railroad real property receiving a tax exemption under state law does not come within the ameliorative intent of this provision. Admin. Code, § 207-8.0(a)(2).[4] The Ordinance defines "reasonable return" as a "net annual return of six per centum of the valuation of an improvement parcel", and further provides that, in general, "[s]uch valuation shall be the current assessed valuation established by the City. . . ." Admin. Code, § 207-1.0(v)(1) and (2).[5]

The effect of these rulings by the Commission was to deny Penn Central the right to construct an office building over the Terminal which, but for the designation of the Terminal as a landmark pursuant to § 207-2.0(a)(1), Admin. Code, would otherwise be permitted under local zoning regulations. (1178-1181) The assessed valuation of the Terminal

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[4] The state tax exemption is provided by N.Y. Real Property Tax Law, § 489-ff (McKinney).

[5] Net annual return is defined, after allowing for certain exclusions and inclusions which are not presently applicable, as "the amount by which the earned income yielded by the improvement parcel during a [given] year exceeds the operative expenses of such parcel during such year. . . ." Admin. Code, § 207-1.0(v)(3)(a). An improvement parcel is defined as a "unit of real property which includes a physical betterment constituting an improvement and the land embracing the site thereof, and . . . is treated as a single entity for the purpose of levying real estate taxes. . . ." Admin. Code, § 207-1.0(j).

is approximately $33 million so that under the standard set forth in the Ordinance, it does not yield a reasonable return unless its net annual return approximates 6% of $33 million, or about $2 million per year. (1964)[6]

In October, 1969, Penn Central filed an action for declaratory judgment in State Supreme Court challenging, on federal and state constitutional grounds, the impact of the Ordinance on the Terminal's ability to realize a reasonable return. Based upon evidence adduced before the trial court, the presiding State Supreme Court Justice found that the Terminal had an operating deficit in 1971 in excess of $1.9 million. This was well below the 6% net annual return on assessed valuation which the standard established in the Ordinance defined as "reasonable." Evidence submitted by the City merely tended to reduce the annual deficit for 1971 from more than $1.9 million to approximately $1.1 million. 50 App.Div.2d at 278-79; 377 N.Y.S.2d at 34 (dissenting opinion). The trial court further found that Penn Central's right to transfer air development rights, pursuant to certain City zoning resolutions,[7] to alternative sites it owned adjacent to the Terminal, did not provide proper compensation. *Id.* 50 App.Div.2d at 283; 377 N.Y.S.2d at 37-38.

In June, 1970, prior to the trial court's decision,[8] Penn Central became insolvent, was declared bankrupt, and had its affairs pass to the control of trustees in bankruptcy. Between January, 1971 and June, 1972 the trustees, seeking to ensure the continued operation of two commuter rail-

[6] Because of the exemption provided for by § 489-ff, *supra*, p. 7, n. 4, the reasonable return standard of § 207-1.0(v) is not directly applicable here, yet it does provide an objective guideline against which reasonable return can be measured.

[7] Applicable provisions of these zoning resolutions are annexed to the Jurisdictional Statement as Appendix F.

[8] The decision of the trial court was rendered in January, 1975.

road networks, vital to the City's transportation scheme, entered into a series of contracts with the Metropolitan Transportation Authority of New York (the "MTA") and the Connecticut Transportation (the "CTA"). Under these contracts the MTA and the CTA assumed the ownership and operation of these commuter services and employed Penn Central to conduct them on their respective behalfs.[9]

In addition, the MTA entered into a sixty-year lease of Grand Central whereby it agreed to pay Penn Central a maximum annual rent of $454,415 for the use of the Terminal. For its part Penn Central agreed to contribute a credit towards the MTA's expenses of operating the Terminal in the amount of at least $2 million annually for sixty years. Under this lease the MTA became Penn Central's tenant and is alone entitled to the rents and other economic benefits of the Terminal. However, the air rights above the Terminal were specifically excluded from the coverage of this lease. The cumulative effect of these necessary legal agreements was to "leave Penn Central with no possible source of return from the Terminal save [air] development rights." 50 App.Div.2d at 278, 283; 377 N.Y.S.2d at 33, 37 (dissenting opinion).

The Appellate Division reversed the State Supreme Court decision on the ground that Penn Central failed to sustain its burden of proving that the effect of the Landmarks Preservation Ordinance, as it applied to the Termi-

[9] The assumption by public agencies of the commuter lines, when taken in conjunction with the assumption of long-distance passenger service by Amtrak (957)(see 45 U.S.C. §§ 501 *et seq.*) and the pre-existing public ownership of the City's subway and bus routes, means that virtually the whole transportation network servicing the Terminal is either publicly or quasi-publicly owned.

nal, constituted a "compensable taking." 50 App.Div.2d at 272; 377 N.Y.S.2d at 27.[10]

The Court of Appeals, in the decision now appealed from, affirmed, but on grounds distinct from those relied upon by the lower courts. It acknowledged that the Due Process Clause prohibits regulations that deprive a property owner, without providing compensation, of a reasonable return on his property. However, it held on the central question of whether Penn Central was receiving a reasonable return on the assessed valuation of the Terminal (the base provided for in the Ordinance) that reasonable return was not to be computed as a function of that base. It held, instead, that in computing reasonable return:

> "[T]here is no constitutional imperative that the return embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests. . . . It is enough for the limited purposes of a landmarking statute . . . that the privately created ingredient of property receive a reasonable return. It is that privately created and privately managed ingredient which is the property on which the reasonable return is to

[10] Penn Central's specific failures of proof, according to the Appellate Division's majority, included its failure to show that its deficit was attributable to its operation of the Terminal as distinct from its railroad operations, its failure to impute a rental value to the space it occupied in the Terminal which was devoted to its railroad business, its failure to sustain its burden of proving that it was unable to manage the Terminal more efficiently, its failure to establish that its air development rights could not be utilized over other properties it owns in the vicinity of the Terminal, and finally, its failure to prove that the MTA and CTA agreements were justification for invalidating the Terminal's landmark designation. See 50 App.Div.2d at 272-73; 377 N.Y.S.2d at 28-29.

> be based. All else is society's contribution. . . ." 42 N.Y.2d at 328; 397 N.Y.S.2d at 916.[11]

Under the approach of the Court of Appeals this so-called "privately created and privately managed ingredient" somehow is to be segregated out and subtracted from the full value of the property and a reasonable return should be allowed only on this privately created component. The property owner, according to the Court of Appeals, is entitled to no return on that ingredient of property value created "by the accumulated indirect social and direct governmental investment in the physical property, its functions and surroundings." 42 N.Y.2d at 327; 377 N.Y.S.2d at 916.

The Court justified this innovative procedure by pointing out that much of the value of the Terminal was created by public effort. After noting that society granted the railroads of the nineteenth century, including the one which constructed the Terminal, various benefits, and further that the City, through its construction, maintenance and operation of municipal transportation routes, has also increased the value of Grand Central, the Court concluded that:

> "Absent this heavy public governmental investment in the terminal, the railroads, and connecting transportation, it is indisputable that the terminal property would be worth but a fraction of its current economic value.
>
> • • •

[11] This principle, according to the Court of Appeals, is not confined to designated landmark property alone, but apparently applies to all private enterprise. The Court wrote, in the same passage quoted above, that these "attributes . . . derived from the social complex" create ". . . opportunities for . . . utilization or exploitation which an organized society offers to *any private enterprise*, especially to a public utility, favored by government and the public. These, too, constitute a background of massive social and governmental investment in the organized community without which *the private enterprise* could neither exist nor prosper." *Id.* 42 N.Y.2d at 328; 397 N.Y.S.2d at 916 (emphasis supplied).

> "To put the matter another way, the massive and indistinguishable public, governmental, and private contributions to a landmark like the Grand Central Terminal are inseparably joint, and for most of its existence, made both the terminal and the railroads of which it was an integral part, a great financial success for generations of stockholders and bondholders. . . . A fair return is to be accorded the owner, but society is to receive its due for its share in the making of a once great railroad. The historical, cultural, and architectural resource that remains was neither created solely by the private owner nor solely by the society in which it was permitted to evolve." 42 N.Y.2d at 331-33; 397 N.Y.S.2d at 919.

It is not significant that the Terminal currently operates at a loss, because, in the opinion of the Court of Appeals:

> "[T]he [Terminal] may be capable of producing a reasonable return for its owners even if it can never operate at a profit. For it should be evident that [Penn Central's] heavy real estate holdings in the Grand Central area, including hotels and office buildings, would lose considerable value and deprive plaintiffs of much income, were the terminal not in operation. Some of this income must, realistically, be imputed to the terminal." 42 N.Y.2d at 333; 397 N.Y.S.2d at 920.

In addition to receiving a reasonable return based upon the imputation of income from other properties it owns in the vicinity of Grand Central Terminal, Penn Central was not denied its right, according to the Court, of exploiting certain air development rights. Under the Ordinance and municipal zoning regulations Penn Central's air rights above the Terminal may be transferred to other properties

it already owns. The Court admitted that there were many defects in the City's program for air rights transfers and many obstacles in the way of exploiting these rights. 42 N.Y.2d at 334-35; 397 N.Y.S.2d at 920-21. The Court was of the opinion, though, that "[t]hese substitute rights are valuable, and provide significant, perhaps 'fair', compensation for the loss of rights above the terminal itself." 42 N.Y.2d at 336; 397 N.Y.S.2d at 922. Nevertheless, although acknowledging that its analysis raised issues of "impenetrable densities" the Court ultimately concluded that "a property owner is not absolutely entitled to receive a return on so much of the property's value as was created by social investment." 42 N.Y.2d at 336-37; 397 N.Y.S.2d at 921. It ultimately held, therefore, that "the regulation does not deprive plaintiffs of property without due process of law, and should be upheld as a valid exercise of the police power." 42 N.Y.2d at 328; 397 N.Y.S.2d at 916.

Summary of Argument

(a)

The present case requires this Court to apply the constitutional test which distinguishes between the non-compensable regulation of property pursuant to the police power, and the taking of property for public use, which, under the Fifth and Fourteenth Amendments, requires compensation. The decision of the Court below has obliterated this distinction. It has affirmed a result that allows the designation of private property under a landmarks preservation statute, a designation that may make it impossible for a property to yield a reasonable return, to be considered a non-compensable, police power regulation.

Such a conclusion is inconsistent with the established test of this Court which views the line separating valid

police regulations of property from compensable takings as one of degree. *Pennsylvania Coal* v. *Mahon,* 260 U.S. 393 (1922). A variant of this test is applied where the constitutionality of zoning restrictions is in issue. These restrictions are analogized to the common law doctrine of nuisance and will generally be allowed where they seek to restrain acts that have a substantial relation to the community's health, safety, morals or general welfare. *Village of Euclid* v. *Ambler Realty Company,* 272 U.S. 365 (1926). The core of the police power is the promotion of the safety of the community.

The scope of the police power is diminished where it seeks more affirmative goals, such as the beautification of the community. These are proper objectives of state interest but, in contrast to the nuisance analogy, generally they are attained through the exercise of eminent domain. The policy ground for this distinction is that it is considered unfair for the burdens of advancing the general welfare, through the coercing of affirmative acts, to fall disproportionately on a single citizen or property owner. This limitation of police power is appropriately applied to the landmark regulations before this Court. While the statute as written does balance public concern with individual rights, in this case the determination made deprives the property owner of the beneficial use of the property without compensation.

(b)

The present landmarks statute attempts to provide that a property designated under its provisions is still assured of a reasonable return. The Court below has not adhered to that protective standard. On the contrary it has introduced unprecedented ideas into its analysis of the statute. Instead of gauging the reasonableness of return as a function of the assessed value of a property (the norm provided

in the law) the Court has bifurcated the concept of value. It has held that a property owner is only entitled to a reasonable return on the private components of the property's value; so-called "social" contributions to value are excluded from its base for the purpose of computing reasonable return.

The Court has not suggested any standards that would control this process of apportioning the value of property into private and public components. There is no precedent for this binary theory of property. *United States* v. *General Motors Corp.,* 323 U.S. 373 (1945). The implications of this theory are unsettling to the many areas of the law dealing with questions of property valuation.

The Court below also has held that a landmark property not realizing a reasonable return could have income imputed to it from other properties belonging to its owner. This conclusion, too, is inconsistent with standards established in the regulations in issue and without precedential support. The private property of railroads and public utilities is also entitled to constitutional protections, and cannot be taken by the public without the payment of just compensation.

(c)

Speculative air development rights, which are contingent and uncertain, cannot be utilized without violating the constitutional standard of the Just Compensation Clause. *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312 (1893). General policy considerations and those specifically applicable to landmarks preservation laws justify continued adherence to the constitutional principles expressed in that Clause and the rejection of the present extreme extension of the police power over such private property.

ARGUMENT

POINT I(a)

A private property owner's rights under the Fifth and Fourteenth Amendments are violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance):

(a) The owner's right to a reasonable return on its property is denied.

The present case requires that this Court again apply the constitutional balancing test, rooted in the Fifth and Fourteenth Amendments to the Constitution of the United States, that distinguishes land use regulation, pursuant to the police power, from the compensable taking of private property for public use. The former is not deemed an appropriation of property subject to the attendant constitutional guarantee of just compensation, while the latter has traditionally been so regarded.

The Court of Appeals, in the decision now on appeal before this Court, has obliterated this established constitutional distinction. It has held that the designation of the Terminal as a landmark, a designation that greatly limits its economic potential, and indeed results in a massive operating loss, to be a valid exercise of the City's police power. In reaching its conclusion the Court of Appeals has given theoretical recognition to but failed to follow, the fundamental principle, well established in the prior decisions of this Court, "that government may not, by regulation, deprive a property owner of all reasonable return on his property." 42 N.Y.2d at 327; 397 N.Y.S.2d at 915.

This principle, derived originally from Blackstone (see 1 W. Blackstone, *Commentaries at* 138-9), has been applied in this Court at least since *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871); and *Mugler* v.

Kansas, 123 U.S. 623, 667-69 (1887). There is nothing in the prior cases of this Court that suggests that this principle is not as fully applicable to landmark property as it is to all other property. This principle was specifically adopted in the Ordinance, under which the Commission acted when it designated the Terminal as a landmark. The Ordinance, in fact, created an objective standard when it quantified reasonable return as a net return of 6% per year of current assessed valuation. (See pp. 7-8, *supra*). It should be emphasized here that *Amicus* is not challenging the basic constitutionality of the Ordinance, or the initial designation of the Terminal as a landmark. What is presently at issue is the interpretation given the Ordinance by the Court of Appeals and the effect of the application of the Ordinance, as so interpreted, on the ability of the Terminal to realize a reasonable return (as determined by the trial court and the dissenters in the Appellate Division).

Disregarding the statutory standard of 6%, the Court of Appeals held that in computing what the Ordinance mandates as a reasonable return, the base is not what the Ordinance says it is, namely assessed valuation. Instead, in the Court's view, the base is rather assessed valuation reduced by the "accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings." 42 N.Y.2d at 327; 397 N.Y.S. 2d at 916.[12] The Court below gave no clue as to how this component of social and governmental investment might be computed.

The Court below also held that, in ascertaining reasonable return on this reduced base, it is proper to impute to the landmark property income that the owner may derive

[12] Other formulations of this concept of public contributions to base appear at 42 N.Y.2d at 328, 332-33; 397 N.Y.S.2d at 918-19 (see pp. 10-12, *supra*).

from other properties he may happen to own in the vicinity of the landmark. This result was reached despite the operative regulation defining reasonable return as an annual net return of 6% on the landmark treated as a single property entity with no reference to other properties of the same owner. (See p. 7 n. 5, *supra*). In addition, the Court treated speculative air rights, potentially transferable under the City's zoning regulations, as providing significant, "perhaps fair", compensation to the owner.

The Board respectfully submits that, collectively, these conclusions of the Court below are in conflict with prior decisions of this Court dealing with the relationship of the police power to the Fifth and Fourteenth Amendments. Additionally, the Board submits that the holdings below on the issues of reduction of base and the imputation of income between separate properties of a single owner constitute wholly unprecedented departures from traditional concepts of Anglo-American property law and from the statutory guidelines established in the Landmarks Preservation Ordinance.

It is the opinion of the Board that if the legal analysis and conclusions of the Court below on these questions are allowed to stand, traditional notions of private property will be seriously undermined. The Board also believes that the decision below will lead to the introduction into questions of property ownership and operation as well as valuation and assessment, large areas of uncertainty and unpredictability. These unsettling effects of the decision of the Court below will be felt in condemnation, tax and real property assessment cases, and in all other related areas of the law where the ownership, operation and valuation of real property is in issue.

Nor can it be clear from the decision below that the holding of the Court of Appeals was limited to designated

landmarks which belong to public utilities which have traditionally been assisted by the public through franchises, grants and other benefits. The Court below, in general terms, formulated the first of the two basic issues before it as: the extent to which government must, "when regulating private property", allow a reasonable return on public contributions not created "by the efforts of the property owner." Moreover, there is no inherent limitation on the application of the principle to landmark property alone. (See pp. 10-12, n.11, *supra*).

That the reasoning of the Court below cannot logically be confined to landmark property may be gleaned from the observation that "no property has economic value in the absence of the society around it . . ." and that reasonable return need not be guaranteed on "opportunities for the utilization or exploitation (of attributes derived from the 'social complex') which an organized society offers to any private enterprise. . . ." In its recapitulation of its holding the Court of Appeals stated, in general language, that, "a property owner is not absolutely entitled to receive a return on so much of the property's value as was created by social investment." Again, there is no qualification which could necessarily limit the import of this holding to only landmark property. If the Court were to affirm this reasoning, the result would be the transformation of our traditional legal concepts regarding the nature of private property.

This Court has historically recognized that the distinction between a non-compensable regulation of property through the police power and a taking requiring just compensation is one of degree. As articulated by Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In applying this balancing test this Court has expressed clear recognition of the confiscatory dangers inherent in too broad an application of the police power in the context of land use regulation and a consequent bias, in close situations, in favor of the constitutional protection of just compensation. As Justice Holmes noted, while at times the police power will be exercised in ways that diminish property values, when such exercise "reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." If the test were not one of degree or magnitude, with clear outside limits placed upon the exercise of the police power, "the contract and due process clauses are gone." *Id.* 260 U.S. at 413.

A variant of the balancing principle of *Pennsylvania Coal* is applied to municipal zoning laws of general application. In the seminal case of *Village of Euclid* v. *Ambler Realty Company*, 272 U.S. 365 (1926), this Court upheld, against a facial attack, the constitutionality of a comprehensive local zoning ordinance which restricted non-residential development, concluding that such regulations are analogous to the right to restrain public nuisances under common law.[13] Under the balancing test applied by the

[13] On this point the Court, per Justice Sutherland, wrote that:

"The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. . . . In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful [clue]. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. . . . A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Id.* 272 U.S. at 387-88.

Euclid Court, it could not be concluded that the community acted unconstitutionally in restricting, out of considerations of public health, safety, morals or the general welfare, the industrial and commercial use of undeveloped property within its jurisdiction. *Id.* 272 U.S. at 390-92, 395-97.

Since *Euclid* this Court has followed this fundamental principle and has consistently held that the power of zoning is founded on the analogy to the restraint of nuisances. This type of analysis requires that the interests and public policy considerations of the community in support of its regulation, pursuant to its police power, be balanced against the harm done to the property owner subject to the regulation. Even where this analysis is applied in the context of a comprehensive zoning scheme, the regulation will not be upheld unless the community can show it is not arbitrary, and bears "a substantial relation to the public health, safety, morals or general welfare". *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188 (1928), (regulation held not to satisfy this test).

This Court has considered relatively few cases since deciding *Nectow* which have required the application of the *Pennsylvania Coal* and *Euclid* tests. But what is apparent from the subsequent decisions of this Court is that the police power, in the context of land regulation, is at its most expansive and has the most substantial relation or nexus to the valid considerations underlying this power where the community's physical health or safety is truly at issue. So, for example, this Court has consistently sustained the reach of the police power against private property rights where the government acts under the exigencies of war (see *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Bowles* v. *Willingham*, 321 U.S. 503, 517-18 (1944)) or riot (see *National Board of Young Men's Christian Association* v. *United States*, 395 U.S. 85,

92-93 (1969)), or out of consideration of the public's physical safety (see *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 595-97 (1962)) (restraining th maintenance of excavation site, deemed an attractive nuisance, in residential neighborhood)), or morality (see *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 9 (1974)) (upholding restrictions preventing more than two, non-related persons from residing in one-family dwellings)).

These cases lend strong support to this Court's recent statement that, in general, the "promotion of safety of persons and property is unquestionably at the core of the State's police power. . . ." *Kelley* v. *Johnson,* 425 U.S. 238, 247 (1976). Where these are the ends sought by the municipality its police powers are at their maximum reach.

The police power is at a greatly reduced level, however, where the community seeks not the restraint of nuisances but the creation or preservation of its aesthetic appearance or historic places. These are proper objectives of government and there is no longer any "basis for doubting the power of the State to condemn places of unusual historical interest for the use and benefit of the public" *Roe* v. *Kansas,* 278 U.S. 191, 193 (1929); or its power to order, through the exercise of eminent domain, that beauty, as well as sanitary conditions, be created. See *Berman* v. *Parker,* 348 U.S. 26, 33 (1954); *United States* v. *Gettysburg Electric Ry.,* 160 U.S. 668 (1896). But as these cases strongly intimate, where the government's goals are addressed merely to aesthetics or taste and it can be shown, as here, that a reasonable return is not available, then it must proceed under the eminent domain power with just compensation to the affected property owner.

In *Berman* v. *Parker, supra,* the property owner, although paid just compensation for his property, nevertheless objected to the condemnation of his economically viable

store which, although not a nuisance, did not harmonize with the vision of a nw community being planned by an urban development agency. In upholding the municipality's approach this Court decided that if the legislative power determines that a community "should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.* 348 U.S. at 33. But the *Berman* Court plainly indicated that where the community strives for more affirmative ends than the mere restraint of nuisances, it must either allow the owner a fair return on his property or resort to its condemnation authority, since "[t]he rights of the proprty owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." 346 U.S. at 36. Significantly in *Berman,* the municipality never attempted to or maintained that it could proceed to its objective through the police power alone. See *United States* v. *Gettysburg Electric Ry., supra* 160 U.S. at 680.

Clearly then, particularly in view of the absence, under the landmark designation, of a fair return on the property, the limited reach of the police power in an aesthetics case like the one at bar should require the payment of just compensation as in *Berman* v. *Parker.* The case now before this Court presents a far more compelling pattern than existed in *Berman* for the City to exercise, not its police power, but rather its powers of eminent domain.

In *Berman* the municipality was implementing a broad, neighborhood-wide slum clearance or nuisance-eradicating plan wherein only a small aspect, namely the condemnation of plaintiff's store, dealt with affirmative beautification schemes. In its effort to reach that result the municipality was also allowed to take, upon the providing of just compensation, an individual building that might not otherwise be subject to eminent domain.

In the present situation no hybrid of nuisance-ridding and affirmative goals is presented. Rather, in the instant case, the police power of the community is being utilized solely in an affirmative manner. It is being exercised through a landmark ordinance, to compel an individual property owner to maintain, at his expense and solely for the positive aesthetic benefit of the community, a celebrated but anachronistic structure on which it is impossible to realize a return which the governing law defines as "reasonable."[14] In assessing the validity of a landmark preservation regulation such as the one at bar, the constitutional calculus that finds expression through the balancing of the respective interests of the community and the property owner, therefore, weighs more heavily in the latter's favor.

This is so because there is a necessary corollary to the proposition discussed above concerning the relatively broad reach of the police power where it seeks the restraint of nuisance conditions, potentially harmful to the general community. The corollary is that the police power is relatively meager and the individual's property rights are correspondingly high where the municipality's goal is not the abatement of generally dangerous or harmful conditions but rather the preservation of a single, isolated parcel of privately owned property, which is of interest to the community, not because it retains a viable, economic function, but because it constitutes a splendid example of Beaux Art architecture in its pristine state. Where this is the community's sole end—and where it would otherwise require

[14] There has been no showing that the contracts into which Penn Central's trustees in bankruptcy were obligated to enter—in view of the company's precarious economic condition—with the MTA and CTA, were not arms-length transactions, made in good faith. See *Benenson* v. *United States*, 548 F.2d 939, 950-52 (Ct. Cl. 1977). As noted above, the effect of these transactions was to leave Penn Central in a continuous deficit situation regarding its ownership of the Terminal for a period at least as long as its sixty year lease with the MTA, (see p. 9, n. 9, *supra*).

depriving the owner of a fair return on his property—it can be achieved only by compensating the owner for placing these restrictions on his otherwise proper and legal utilization of his property.

The policy behind this requirement is clear. It is easier for a community to agree on what is harmful to its interests, than it is for it to decide on what is beneficial. The eradication or regulation of objectionable conditions, such as crime, filth, disease, or the inappropriate juxtaposition of function (a pig in the parlor, *supra* at p. 20, n. 13 or a charnel house in a one-family home district), are universal goals of organized communities. These are easily understood, uncontroversial goals which command widespread community support, and can be achieved by government restraining the doing of certain acts by individuals. For these reasons they are at the core of the traditional police power.

On the other hand matters of art and aesthetics involve considerations of subjective judgment and taste which can be influenced by changing and temporal styles, fashions and considerations. Government does not, necessarily, possess greater insight and sensitivity here into what is ultimately valuable and important. Where government acts to designate as a landmark a certain private work or structure that it deems worthy of preservation, it must do more than merely restrain their owner from destroying this work. It must also compel him to continue to affirmatively support and maintain it.[15] The compelling of costly and affirmative acts from an individual is not, generally, one of the ends of

[15] In fact the Ordinance specifically provides criminal sanctions against persons who violate its provisions. Admin. Code, § 207-16.0. Because of the unseemliness of sending a citizen to jail for his refusal or inability to underwrite the cost of preserving a community landmark, the Ordinance is supposed to operate in a manner which provides relief for property yielding an insufficient return, although, for reasons noted earlier, that provision of the Ordinance, § 207-8.0, is not directly applicable to the Terminal (see p. 8, n. 6, *supra*.)

the police power. See Dunham, "A Legal and Economic Basis for City Planning," 58 Column.L.Rev. 650, 651 (1958). Instead, in part to restrain government from acting irresponsibly in these areas, this Court has in the past required that society pay for its aesthetic and historic preservation judgments. See *Berman* v. *Parker, supra* 348 U.S. at 36; *United States* v. *Gettysburg Electric Ry., supra* 160 U.S. at 680.

The present situation counsels strongly for the continued limitation of the police power in the area of aesthetic choices. It is evident here that there is nothing on the face of the designs for the proposed Beuer buildings that could be regarded as a community nuisance. There is certainly nothing inappropriate about the existence of a modern, high-rise office building in a section of the City which is zoned for, and indeed now contains a cluster of such buildings which may well be the most concentrated in the world. Reasonable minds in the community might easily differ on whether the preservation of the quality of sunlight and shadow (and what the Commission called "atmospheric perspective")—that now characterizes the south facade of the Terminal, and which might be affected by the proposed building (see p. 6, *supra*)—is not more than offset by considerations of how the new building may increase the City's tax revenues, or land values in the area. Nor can it be said that the architectural community is necessarily in agreement with the views expressed by the Commission in rejecting Breuer I.[16]

The community's purposes for regulating individual property in these cases is generally less compelling than in those where the police power is clearly properly utilized. Thus there is a particular inequity in landmark regulations which, unlike zoning or historic district regulations (see

[16] See R. Venturi, *Complexity and Contradiction in Architecture* 42 (1966).

Maher v. *City of New Orleans,* 516 F.2d 1051 (5th Cir. 1975), *cert. den.* 426 U.S. 905 (1976); *Opinion of the Justices to the Senate,* 333 Mass. 773, 128 N.E.2d 557, 561-562 (1955); *Figarsky* v. *Historic District Commission,* 171 Conn. 198, 368 A.2d 163, 170 (1976)), does not have general, or even neighborhood-wide application. As noted by the Court of Appeals, in landmark regulation:

> "the burden of limitation is borne by a single owner. He may or may not benefit from the limitation but his neighbors most likely will. In contrast both an owner and his neighbors benefit to some degree and in some manner from zoning and historic districting." 42 N.Y.2d at 330; 397 N.Y.S.2d at 917-18.

The use of public power to preserve specific structures too as in the landmark law here under consideration can be upheld when its general application will result only in a reasonable regulation of use. But when the restrictions on use deprive the owners of a reasonable return on the property, this amounts to a taking, which must be compensated. *Lutheran Church In America* v. *City of New York,* 35 N.Y.2d 121, 359 N.Y.S.2d 7 (1974).

Apart from forcing Penn Central, "a once great railroad," to maintain a deteriorating but ornate Terminal as a monument to the "glorious past" of railroading, 42 N.Y.2d at 333, 337, 397 N.Y.S.2d at 919, 922, it is hard to discern the social benefits that flow from this hermetic and economically-unwise arrangement. It is also unfair, in view of these circumstances and in view of the absence of a reasonable return on the property, to require that the burden of maintaining the property as a landmark fall solely upon the landowner.

POINT I(b)

A private property owner's rights under the Fifth and Fourteenth Amendments are violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance):

(b) The return on its regulated-business property is computed on a base from which social contributions are excluded and to which income from other property owned by the owner is imputed.

The draftsmen of the Ordinance seemed aware of the limits this Court has placed on the extreme regulation of private property. The Ordinance reflects a belief on the part of the enacting legislative body that a landmark regulation that reduces net annual return on assessed value beneath 6% will, almost certainly, be deemed a confiscatory taking, requiring the payment of just compensation. (See pp. 7-8 *supra*).

But the Court of Appeals, in apparent solicitude towards the state of the City's finances, see 42 N.Y.2d at 337, 397 N.Y.S.2d at 922, has not adhered stringently to these protective guidelines of the Ordinance. Instead, the Court has transformed the stated standards of the Ordinance. In so doing it has reached a result that is illogical, unworkable and confiscatory, which undermines the concept of property embodied in the Fourteenth Amendment, and is inconsistent with its earlier decisions in this area. See *Fred F. French Investing Company, Inc.* v. *City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, *appeal dism'd*, 429 U.S. 990 (1976); *Lutheran Church in America* v. *City of New York*, 35 N.Y.2d 121, 359 N.Y.S.2d 7 (1974); *In the Matter of Keystone Associates* v. *Moerdler*, 19 N.Y.2d 78, 278 N.Y.S.2d 185 (1966).

The most unprecedented aspect of the decision of the Court of Appeals is its disregard of the clearly expressed

legislative view that reasonable return on property is to be computed as 6% of its assesed valuation. Instead the Court has adopted the theory that the value of private property is composed of two distinct parts—one representing the private contribution and one the collective social input—which in their totality comprise the property's true worth. Private property subject to regulation of the state's police power is entitled, according to the Court of Appeals, to a reasonable return only on the private components of the property's value.

This notion constitutes a striking departure from ancient principles of Anglo-American property law and from accepted definitions of property. See *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945). It is axiomatic that property values assume certain social attributes. Property values, for example, may increase in times of peace and social tranquility and decrease during periods of war or civil strife. Similarly property values of a community may reflect the ability of that community to supply essential public services such as fire and police protection, sanitation and sewer facilities and the like. The inability of the community to supply these services will almost assuredly have an adverse impact on property values. By logical extension, the property values of a community are also a function of the ability of the larger polity, of which the individual municipality is but a small part, to maintain a broadly accepted currency, a functioning communications network, even, a common, widely understood language. Indeed the very concept of ownership is a "social attribute" of property, as is the legal tender by which an owner receives a return upon his property.

The theory adopted in this case by the Court of Appeals may have its supporters among certain commentators.[17] However, no other court, heretofore, to our knowledge, has adopted these unsettling views that displace long-established, traditional concepts of private property. Nor has any other court, to our knowledge, ever suggested that in ascertaining the true value of property the myriad social factors contributing to its value are to be winnowed out, leaving "real" value to be reflected merely by the privately contributed residue.

Even if we are to assume, *arguendo,* that what the Court of Appeals calls the "privately created and privately managed ingredient" of property could be somehow isolated from social inputs to value, the general employment of this concept would cause upheaval in many areas of property law. If this measure of value can be employed by the Landmarks Commission in this case to reduce the base on which a reasonable return is to be computed, there is nothing that would logically prevent the State from condemning private property on the value of the "private contribution" alone—substantial properties could be con-

[17] Some support for the result reached on this question by the Court of Appeals can be found in J. Costonis' *Space Adrift* (1974). Costonis has helped develop many of the arguments now before this Court. See Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," 85 Harv.L.Rev. 574 (1972); Costonis, "'Fair' Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies," 75 Colum.L.Rev. 1021 (1975). But see Berger, "The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis," 76 Colum.L.Rev. 799 (1976); Note, "The Police Power, Eminent Domain, and the Preservation of Historic Property," 63 Colum.L. Rev. 708 (1963). Costonis has written that "urban space should no longer be regarded simply as private property. . . . Rather, it has become in part a public asset which cities may allocate through incentive zoning to achieve community goals. . . ." *Space Adrift* at 35. Costonis does, at least, acknowledge that heretofore this approach has ". . . consistently been frustrated [by the courts] under outdated but deeply ingrained property and land use concepts." *Id.* at 35.

demned for fractions of their true value. The result would be that the state could—as it has in this case—confiscate property whenever it sees fit without having to compensate the owner for its value (as we have always understood that term). Even in the case of a tax assessment proceeding the owner might, on the authority of the doctrine enunciated by the Court of Appeals in this case, seek to reduce the value of this property by subtracting from it elements added through the public section (such as the value of roads, sewers, fire and police protection, transportation systems etc.) and have taxes assessed only against the remaining private component. Nor does the Court of Appeals, in upsetting the traditional, unitary concept of assessed valuation, adopted in the Ordinance, provide any guidelines or standards as to how its new, binary system is to be operated by the Commission. See *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167-69 (1962); *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 321-22 (1933).

Under our economic and social system property value often reflects the interaction of private initiative and capital with public policy and goals. But where the underlying investment is private and where the property is held in private hands, it has not been the policy of our law to factor out the public's contribution before ascertaining the value of the property. See *United States* v. *General Motors Corp., supra,* 323 U.S. at 379; *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 326 (1893). The adoption of such a theory would require the making of an incalculable number of assumptions about the public's often unintended and fortuitous acts, as when government, in laying out streets, creates unusual plots (*i.e.* Times Square, the Flatiron Building and the streets abutting Central Park) which add value over the years to the properties located there. Under our economic theory these attributes of value are

subsumed into the property as part of the total bundle of rights which constitute its value. The attempt to remove them, as the Court has done at bar in the case of Grand Central Terminal, is arbitrary and without rational foundation. It is inconsistent with our society's notions of private property, would create chaos if widely adopted, and should not therefore be countenanced.

The Court of Appeals in reaching its decision relied on yet another unusual proposition. It stated that, even if the Terminal is not receiving a reasonable return, part of the income from other profitable properties owned by Penn Central in the vicinity of the Grand Central should be imputed to the Terminal. The ground for this imputation was the Court's observation that "it should be evident that [Penn Central's] heavy real estate holdings in the Grand Central area, including hotels and office buildings, would lose considerable value and deprive plaintiffs of much income were the terminal not in operation." 42 N.Y.2d at 333; 397 N.Y.S.2d at 920.

This proposition, aside from being intrinsically unsound, goes off on a tangent. The issue is not whether or not the Terminal continues in operation; all parties have always agreed that it should continue to operate as a terminal and the plans for the employment of the air rights by the construction of an office building above it contemplate the continuance of the Terminal even to the extent of preserving its present architectural facade. Consequently there can be no issue of depriving plaintiffs of income from their other properties in the area.

More importantly, however, it is totally immaterial to the constitutional issues raised in this action that some of the plaintiffs might fortuitously happen to own other properties in the area which might be affected one way or the other by the creation of a bar to the owner's right to use the air rights which are otherwise available to it.

In any event this conclusion is inconsistent with the standards set forth in the Ordinance. As noted at p. 7, n. 5, *supra,* reasonable return for purposes of a commercial landmark is defined as a "net annual return of six per centum of the [assessed] valuation of *an improvement parcel.*" Admin. Code, § 207-1.0(v)(1) and (2) (emphasis supplied). An improvement parcel is defined, in material part, as a unit of real property which is "treated as a single entity for the purpose of levying real estate taxes." Admin. Code, § 207-1.0(j). Net return for the purposes of § 207-1.0 (v) is defined in the Ordinance as "the amount by which the earned income yielded by the improvement parcel during a [given] year exceeds the operating expenses of such parcel during such year. . . .", after allowing for certain exclusions and inclusions which are not presently applicable. See Admin. Code, § 207-1.0(v)(3).

None of these legislative definitions make any provision for the imputation of income from one property of the regulated landowner to any other property he may happen to own. The Ordinance itself reflects traditional property law. There is no provable, non-speculative basis, or any foundation in real estate law, for imputing to the Terminal, income and value it theoretically adds to Penn Central's other properties in the vicinity. The standard in the Ordinance looks to whether the landmark is viable, in terms of annual net return, when considered alone. Nor is there any rational, non-arbitrary basis for distinguishing between the affect the Terminal has on other Penn Central properties in its vicinity from the affect it has, because it is a terminal and provisions transportation access, upon all property, regardless of ownership, located in this area of

the City.[18] Moreover, there is no proof from which to ascertain whether any incremental value to plaintiffs other properties exists at all. The Court of Appeals merely speculates that there is—scarcely a basis for depriving plaintiffs of constitutional rights.

In an apparent attempt to limit the potentially shattering implications of its decision, the Court of Appeals has attempted to demonstrate that the Terminal represents a special situation. It is not, in that Court's view, an "ordinary" landmark because so much of its value was created by "society as an organized entity, especially through its government. . . ." 42 N.Y.2d at 332; 397 N.Y.S.2d at 918. The Court of Appeals specified some of these social contributions as consisting of grants, franchises and other benefits to railroads, and the operation of municipal transportation routes in and around the Terminal without which there would be no need of railroad terminals such as Grand Central. *Id.* 42 N.Y.2d at 332; 397 N.Y.S.2d at 919. The implication the Court of Appeals draws from these statements is that the Terminal therefore possesses fewer rights with which to resist the City's police power restrictions and lesser claims to demand full compensation for the taking of its assets. While it is certainly true that railroads were favored by government policies in the mid-nineteeth century, it is illogical to leap from this premise to the conclu-

[18] The Court of Appeals appears to proceed, in making this argument, on an illogical assumption. It assumes that Penn Central has selfish motives in operating an economically non-viable terminal, namely, to benefit other property it owns in the area around Grand Central. To the contrary, Penn Central is seeking permission to develop the air rights above the Terminal precisely because Grand Central is not economically sustainable. The true beneficiaries of the present situation are the members of the general public who are having a necessary public facility (a commuter train terminal which is serviced by publicly owned transportation lines) subsidized and maintained in its original, anachronistic configuration by a recently bankrupt, private corporation.

sion, as the Court of Appeals appears to have done, that therefore they are entitled to fewer constitutional protections today. Such a conclusion is wrong as a matter of law. Neither that Court nor this Court has ever so held. In fact this position, to our knowledge, has never even been advanced where railroads and other publicly regulated industries have themselves been subjected to condemnation. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 (1974); *United States* v. *Peewee Coal Co.*, 341 U.S. 114, 117-18 (1951); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 12-13 (1949); *Roberts* v. *New York City*, 295 U.S. 264, 278-81 (1935); *In re City of New York*, 21 N.Y.2d 293, 287 N.Y.S.2d 403 (1967); *In re Port Authority Trans-Hudson Corp.*, 20 N.Y.2d 457, 285 N.Y.S.2d 24 (1967), *cert. den. sub nom. Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968); *In re City of New York*, 18 N.Y.2d 212, 273 N.Y.S.2d 52 (1966), *appeal dismissed sub nom. Fifth Avenue Coach Lines* v. *City of New York*, 386 U.S. 778 (1967).

In re Port-Authority, supra, for example, presented a situation where a railroad, found to be "an essential public facility," 20 N.Y.2d at 465, was in a failing, economic condition. However, despite "the essentiality of [that] facility," *id.* at 465, there was no attempt to seize property of the railroad through the police power. As in all of the cases cited above, the only constitutional question presented was what constituted the proper measure of compensation for the taking, by condemnation, of private property. See *New Haven Inclusion Cases*, 399 U.S. 392, 482-83 n. 80 (1970); also see *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470 (1973); *United States* v. *Fuller*, 409 U.S. 488 (1973).

The Court of Appeals comes close to suggesting that because a privately owned business is a railroad or a regu-

lated utility, or because it maintains facilities widely used by the general public, its property is not within the full protection of the Fifth and Fourteenth Amendments. This Court has consistently rejected such contentions. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974); *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 569-70 (1972); *Smyth* v. *Ames*, 169 U.S. 466, 522-24 (1898); *Chicago, B. & Q. Ry. Co.* v. *Chicago*, 166 U.S. 226, 235-41 (1897); *Missouri Pac. Ry. Co.* v. *Kansas*, 216 U.S. 262, 274-78 (1910); *West* v. *Chesapeake & Pot. Tel Co.*, 295 U.S. 662, 671 n.6 (1935).[19]

POINT I(c)

A private property owner's rights under the Fifth and Fourteenth Amendments are violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance):

(c) Speculative air development rights are deemed to constitute significant and perhaps fair compensation for definite legal rights it possesses under valid contracts.

The Court of Appeals also held that no taking of private property is presently involved, because:

> "[P]laintiffs have not been wholly deprived of the development rights above the terminal. Those rights have been made transferable to other parcels of land in the vicinity, at least eight of them owned by Penn Central...." 42 N.Y.2d at 334; 397 N.Y.S.2d at 920.

[19] The position of the Court of Appeals on this question, although incorrect, lends support to Appellants' claim. Since the Terminal is such an important facility to the City, and since it is now primarily serviced by publicly-owned transportation networks, the City would not create a fiscally unwise precedent by its condemnation. While the City, perhaps, cannot afford to acquire through eminent domain all of the landmarks it may wish to preserve, the nature and function of the Terminal make it a sensible choice for a constitutionally valid public appropriation.

This conclusion does not withstand analysis.

The Court of Appeals attempts to distinguish the present fact pattern from its earlier, seemingly controlling decision in *French* v. *City of New York, supra*, 39 N.Y.2d 587, on the ground that here Penn Central owns the parcels to which the air rights are to be transferred. But the "legal limbo" to which the air rights involved in *French* were consigned, see 42 N.Y.2d at 336; 397 N.Y.S.2d at 921, also exists in the instant case. As the Court of Appeals itself concedes, there are "many defects in New York City's program for development rights transfers...." 42 N.Y.2d at 334; 397 N.Y.S.2d at 920.[20] The Court of Appeals, for example, noted that:

> "The area to which transfer is permitted is severely limited, complex procedures are required to obtain a transfer permit, and the program, it has been said, has the unfortunate consequence of encouraging large, bulky buildings around landmarks which are dwarfed by comparison. But the possibility that a better program could have been devised does not preclude analysis and justification of the existing one in this particular application." 42 N.Y.2d at 334-35; 397 N.Y.S.2d at 920.

In addition, the alternative sites to which the Landmarks Commission would prefer to see Penn Central's rights transferred, are encumbered by pre-existing leaseholds or estates, have been rejected on management grounds, or are otherwise not as desirable in the opinion of Penn Central.

[20] See Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," *supra* 85 Harv.L.Rev. at 585-589; Note, "The Unconstitutionality of Transferable Development Rights," 84 Yale L.J. 1101, 1110-11 (1975); Costonis, "The Disparity Issue: A Context for the Grand Central Terminal Decision", 91 Harv.L.Rev. 402, 419 (1977).

These are decisions which an owner should still be allowed to make, despite the deep intrusion upon such rights the Court of Appeals has deemed appropriate here.

Of even greater significance is the fact that the Landmarks Commission lacks the power to compel the transfer of these air rights to alternate sites. See *Costonis, supra* 85 Harv.L.Rev. at 585-86.

Penn Central's so-called rights are, therefore, speculative and contingent: first because of questions of economic feasibility and the desire of the owner to transfer them and second because any such transfer is subject to the viscissitudes of the political process and attacks through litigation and otherwise by the citizenry. See, 50 App. Div. 2d at 283; 377 N.Y.S.2d at 37 (dissenting opinion). To resolve constitutional rights on so tenuous a basis is inconsistent with the holding of *Seattle Trust Co.* v. *Roberg*, 278 U.S. 116, 121-22 (1928); compare *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 658 (1976).

Despite these myriad obstacles, the Court of Appeals concluded that these air development rights are a substitute for the property rights Penn Central would otherwise be allowed, but for the designation of the Terminal under the Ordinance. The Court stated that these "substitute rights are valuable, and provide significant, perhaps 'fair', compensation for the loss of rights above the terminal itself." 42 N.Y.2d at 336; 397 N.Y.S.2d at 922.

The Court of Appeals therefore, has obviously applied the wrong standard in this case. Prior decisions of this Court under the Just Compensation Clause require, not "perhaps fair" compensation but, rather, "a full and perfect equivalent for the property taken." *Monongahela Navigation Co.* v. *United States, supra,* 148 U.S. at 326. This standard requires that the property owner be put "in

as good [a] position pecuniarily as if [its] property had not been taken." *United States* v. *General Motors Corp., supra,* 323 U.S. at 379. Prior to taking by the Commission of Penn Central's rights to the air space above the Terminal, Penn Central had clearly fixed legal rights under the contract it had entered with its air rights lessee. See p. 7, *supra*).

It cannot be reasonably concluded that these fixed legal rights are fully equivalent to a mere potential to exploit speculative and contingent air development rights. The decision of the Court of Appeals on this issue is, therefore, inconsistent with the prior holdings of this Court defining the meaning of just compensation.

The City, its Commission and the Court of Appeals have rejected a reasonable attempt by Penn Central to balance its economic interests with the aesthetic and cultural interests of society. In place of Penn Central's reasonable compromise proposal, the result below, as represented in the decision now on appeal before this Court, is extreme. It allows the City to mandate, through its police power, that Penn Central continue to operate the Terminal, at an annual financial loss of between $1 and $2 million, for the benefit of the people of the City. Furthermore, no compensation is provided for the denial by the City of Penn Central's application to permit alteration of the design of the Terminal, which alteration would enable it to operate at a profit. *Amicus* respectfully submits that in reaching this result the Court of Appeals has stretched the police power far beyond limits previously authorized by this Court and has done so in a manner which is inconsistent with, and seriously undermines, the Just Compensation and Due Process guarantees of the Constitution.

If the City insists on a result that takes rights away from Penn Central, and consigns the Terminal to perpetual economic non-viability, it must proceed according to the

Just Compensation Clause. This Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960); *National Board of Young Men's Christian Association* v. *United States, supra*, 395 U.S. at 89; *Monongahela Navigation Co.* v. *United States, supra*, 148 U.S. at 326. Penn Central is under no pre-existing public duty that would put it beyond the reach of this basic and equitable principle. See *Hurtado* v. *United States*, 410 U.S. 578, 588 (1973). While "[i]t is laudable to attempt to preserve a landmark . . . it becomes unconscionable when an unwilling private party is required to bear the expense." *People* v. *Ramsey*, 28 Ill. App.2d 252, 171 N.E.2d 246, 247 (1960).

Even in the absence of these constitutional considerations, this Court should not, for other policy reasons, sustain the result below. No greater damage to good architecture and the future of its preservation by landmark designation can be imagined than an affirmance of the rationale of the Court of Appeals in this case. No future developer of real estate could possibly afford to build a structure which by reason of its aesthetic quality might one day be designated a landmark.

To begin with, the value added by good architecture to property adds to the assessed value of that property and thereby markedly increases the owner's real estate taxes. See *Seagram & Sons, Inc.* v. *Tax Commission*, 14 N.Y.2d 314, 251 N.Y.S.2d 460 (1964). Then, should the landmark designation be affixed, must the owner continue to pay real estate taxes on the value enhanced by its architectural distinction? The value on which the tax would be computed to determine the limits of regulation, under the interpretation of the Ordinance by the Court below,

would be drastically reduced by whatever a court might find as society's contribution to the value of the property. Furthermore, if the rationale of the Court of Appeals were sustained it could be logically concluded that even if the property is taken by eminent domain or by regulation amounting to a taking, the only amount the government must pay for this taking would be the value of the real estate as reduced by the value of society's contribution to the property. For this Court to sustain such a result would only be "self-defeating" to valid considerations that underlie the landmarks preservation statutes.[21]

Given the nature of the "financial distress" that may now be afflicting the City, 42 N.Y.2d at 337; 397 N.Y.S.2d at 922, there is, perhaps, a certain consistency in the result reached below. It condemns Penn Central, a financially troubled company, to underwrite a financially draining Terminal, supposedly for the benefit of a financially distressed City. However, "from such false consistency real cities will never grow. Cities, like architecture, are complex and contradictory." Venturi, "Complexity and Contradiction in Architecture," *supra* at 54.

It is clear that if the end the City desires to achieve is the present, economically unwise one, it has sufficient power at its disposal to attain that end. But it is also clear that its powers of eminent domain, and not its police power is the allowable means to this end. Where the police power is used as it has been in this case, in a coercive way to appropriate

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[21] "Self-defeating not only because it calls into question the propriety of such law, but also because the individuals who designed, built, indeed underwrote the great structures now deemed worthy of designation as landmark, undoubtedly did so for a variety of reasons, among which was their intention to profit therefrom. It is not reasonable to assume that if the result of structural distinctiveness is to be a lessening of the entrepreneurial estate, there may well be no structures to designate as landmarks in the years to come?" 50 App.Div.2d at 288; 377 N.Y.S.2d at 41 (dissenting opinion).

private property for the "public good", a violation of the Due Process Clause results. As Justice Holmes observed in *Pennsylvania Coal,* when the seemingly absolute guaranties of the Fifth and Fourteenth Amendments:

> "are qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. *But that cannot be accomplished in this way under the Constitution of the United States.*" 260 U.S. at 415. (emphasis supplied)

The fact that government may accomplish its goals at a reduced public cost by confiscating private property or by ignoring other constitutional guaranties does nothing to justify such acts or to make them any less unconstitutional. See *Stanley* v. *Illinois,* 405 U.S. 645, 650 (1972); *United States* v. *Cors,* 337 U.S. 325, 332 (1949).

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Certificate of Service

The undersigned affirms that on the 19th day of January, 1978, a copy of the foregoing Motion of the Real Estate Board of New York, Inc. for Leave to File a Brief *Amicus Curiae* and Brief *Amicus Curiae* was served on each of the attorneys for Appellants and Appellees at the addresses listed below by depositing in the United States mail the same enclosed in an envelope with adequate postage thereon.

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